IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGAR HUMBERTO PONCIANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47847

FILED

MAR 08 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of discharging a firearm at or into a vehicle and assault with a deadly weapon. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant Edgar Humberto Ponciano to serve two concurrent prison terms of 28-72 months and ordered him to pay $4,350.00 in restitution.

First, Ponciano contends that the district court erred by denying his oral motion to dismiss his court-appointed counsel based on an allegedly significant conflict. Ponciano made his motion on the first day of trial. Ponciano claims that counsel "believed him guilty," and as a result, failed to adequately prepare for trial. We disagree.

There is no constitutional guarantee to a meaningful relationship between a criminal defendant and his counsel.[1] The right to choose one's own counsel is not absolute, and a defendant is not entitled to reject his court-appointed counsel and request alternate counsel at public

[1]Morris v. Slappy, 461 U.S. 1, 14 (1983); see also U.S. Const. amend. VI; Nev. Const. art. 1, § 8.

expense without demonstrating adequate cause.[2] "Good cause for substitution of counsel cannot be determined 'solely according to the subjective standard of what the defendant perceives.'"[3] A defendant's lack of confidence in his counsel is not sufficient.[4] The district court retains the discretion to determine "whether friction between counsel and client justifies appointment of new counsel," and that decision will not be reversed absent an abuse of discretion.[5]

In reviewing a ruling on a motion for substitute counsel, this court considers the extent of the alleged conflict, the timeliness of the defendant's motion, and the adequacy of the district court's inquiry.[6] In this case, "[w]eighing all of the factors,"[7] we conclude that the district court did not abuse its discretion in denying Ponciano's motion to dismiss appointed counsel. Ponciano has not demonstrated that there was sufficient cause to warrant the dismissal of his court-appointed counsel. Therefore, Ponciano's contention is without merit.

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[2]Gallego v.State, 117 Nev. 348, 362, 23 P.3d 227, 237 (2001).

[3]Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985) (quoting McKee v. Harris, 649 F.2d 927, 932 (2d Cir. 1981)).

[4]Id.

[5]Thomas v. State, 94 Nev. 605, 607-08, 584 P.2d 674, 676 (1978) (citation omitted).

[6]See Young v. State, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004); see also Garcia v. State, 121 Nev. 327, 113 P.3d 836 (2005).

[7]Young, 120 Nev. at 972, 102 P.3d at 578.

Second, Ponciano contends that his convictions for discharging a firearm at or into a vehicle and assault with a deadly weapon were impermissibly redundant and violated his right to be protected from double jeopardy. In his "motion opposing redundant sentences," however, filed after the verdict and prior to sentencing, Ponciano conceded that the convictions did not violate double jeopardy, and we agree.[8] On appeal, Ponciano's specific claim is that his convictions are redundant because he is being punished twice for the same criminal act. We disagree.

While the State may bring multiple criminal charges based upon a single incident, "this court will reverse 'redundant convictions that do not comport with legislative intent.'"[9] In considering whether convictions are redundant, this court examines "whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions."[10] In other words, two convictions are redundant if the charges involve a single act so that "the material or significant part of each charge is the same."[11]

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[8]See Blockburger v. United States, 284 U.S. 299 (1932); Barton v. State, 117 Nev. 686, 692, 694, 30 P.3d 1103, 1107 (2001), overruled on other grounds by Rosas v. State, 122 Nev. ___, 147 P.3d 1101 (2006).

[9]State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).

[10]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

[11]Id. at 227-28, 70 P.3d at 751.

In the instant case, the gravamen of the assault with a deadly weapon offense is that Ponciano placed the victim in apprehension of immediate bodily harm by running towards him with a gun in his hand and then pointing the deadly weapon at him. In contrast, the gravamen of the discharging a firearm at or into a vehicle offense is the actual firing of the gun at and into the vehicle occupied by the victim. Therefore, we conclude that the offenses do not punish the same illegal act and are not redundant.

Third, Ponciano contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt on both counts. Ponciano argues that the State relied solely on the testimony of the victim, and the victim's testimony was "fraught with inconsistencies and contradictions." Ponciano claims that he had no motive to attack the victim and that there was a "dearth" of physical evidence.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[12] In particular, we note that the victim, Pastor Luis Miano, testified that while driving his vehicle, he spotted Ponciano approximately 80 feet away. Ponciano lifted his hand and the victim saw that he was carrying a gun. Ponciano then started running towards the victim, and at a distance of approximately 30-50 feet, fired several shots at the victim, hitting the vehicle three times.

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[12]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Ponciano committed the crimes beyond a reasonable doubt.[13] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.[14] Therefore, we conclude that the State presented sufficient evidence to support the jury's verdict.

Finally, Ponciano contends that the district court erred by admitting evidence of uncharged bad acts – unproven threats against his wife and family – without conducting a Petrocelli hearing and without providing the jury with a limiting instruction.[15] Ponciano also contends that the prosecutor committed misconduct by impermissibly referring to the uncharged acts. Ponciano concedes that counsel did not object to the prosecutor's comments or the allegedly improper testimony, but argues that the admission of the evidence amounted to plain error.[16] We disagree. Ponciano has not demonstrated that the admission of the evidence was improper. Moreover, the challenged testimony referring to

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[13]See NRS 202.285(1); NRS 200.471(1)(a).

[14]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

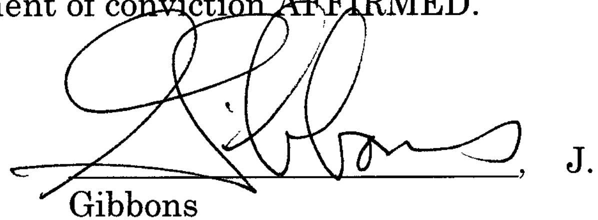
[15]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 114 Nev. 321, 326-27, 955 P.2d 673, 677 (1998); Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[16]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

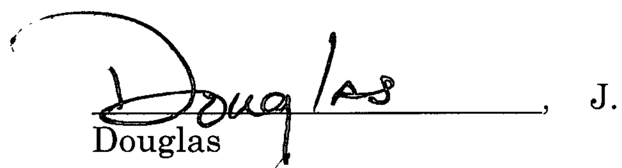
Ponciano's own statements were an admission of his state of mind, not threats qualifying as a prior bad act. Therefore, we conclude that the district court did not commit reversible plain error.

Having considered Ponciano's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_______________________, J.
Gibbons



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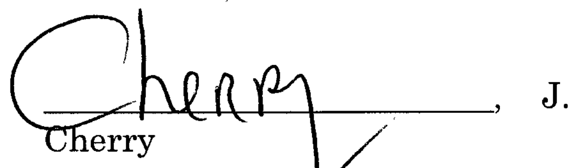
Douglas



_______________________, J.
Cherry

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk